

Defendant's Exhibit 38

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE: FACEBOOK, INC. CONSUMER
PRIVACY USER PROFILE LITIGATION,

This document relates to:

ALL ACTIONS

MDL NO. 2843

CASE NO. 3:18-MD-02843-VC-JSC

HON. VINCE CHHABRIA
HON. JACQUELINE SCOTT CORLEY
COURTROOM 4 – 17TH FLOOR
SPECIAL MASTER, DANIEL GARRIE, ESQ.

**AMENDED SUPPLEMENTAL ORDER
REGARDING PRODUCTION OF ADI
RELATED DOCUMENTS**

BACKGROUND

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2 1. On September 8, 2021, Judge Corley issued an order granting Plaintiffs' motion to
3 compel the production of materials in connection with Facebook's app developer investigation
4 ("ADI") that involved a review of all "apps that had access to large amounts of data before
5 [Facebook] changed [its] platform policies in 2014." See [https://about.fb.com/news/2019/09/an-](https://about.fb.com/news/2019/09/an-update-on-our-app-developer-investigation/)
6 [update-on-our-app-developer-investigation/](https://about.fb.com/news/2019/09/an-update-on-our-app-developer-investigation/).

7
8 2. Pursuant to the order:

9 In light of Facebook's unchallenged public proclamations as to the business purpose
10 of the ADI, the Court finds that the ADI served a dual purpose and that, as a general
11 matter, documents generated as part of that investigation were not created because of
12 litigation. On or before September 21, 2021, Facebook shall produce the background
13 and technical reports, audits and developer interviews of the six exemplar apps
14 chosen by the parties as Facebook has offered no special reasons why those particular
documents are privileged other than what has been addressed. The parties shall work
with the Special Master regarding production of additional materials consistent with
the guidance offered by this Order. See Order Granting Motion to Compel ADI
Materials.

15 3. According to Judge Corley's order, Facebook produced 11 documents related to the ADI.
16 Following this production, Plaintiffs raised multiple issues in connection with Facebook's ADI
17 production and requested "all memoranda prepared by FTI Consulting and/or Stroz Friedberg related
18 to ADI of all apps it investigated or investigated at Facebook's direction, the background and
19 technical reports, audits, and developer interviews, and internal Facebook communications regarding
20 these materials (including those pertaining to the six exemplar apps)." See Plaintiffs' Email of
21 September 24, 2021.
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23 4. The parties subsequently met and conferred regarding Facebook's ADI production, but
24 were unable to resolve the outstanding issues.
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1 5. On October 26, 2021, Special Master Garrie issued Order Regarding Outstanding ADI
2 Issues which ordered the parties to provide summaries of the outstanding ADI issues and the parties'
3 respective positions.

4 6. On October 22, 2021, Plaintiffs submitted their initial statement. Plaintiffs argue that
5 pursuant to Judge Corley's order, Facebook should produce the following in connection with the
6 ADI: (1) all memoranda prepared by FTI Consulting or Stroz Friedberg; (2) all background reports,
7 technical reports, audits, and developer interviews; (3) all internal Facebook communications
8 relating to items 1 and 2; (4) all communications with FTI Consulting or Stroz Friedberg related to
9 items 1 and 2; and (5) all communications with third-party app developers. See Plaintiffs' Statement
10 Concerning ADI Issues in Advance of Hearing. Plaintiffs also argued that Facebook's production of
11 11 reports relating to the six exemplar apps pursuant to Judge Corley's order was incomplete
12 because Facebook's privilege logs include references to additional reports relating to these apps that
13 were not provided. Id.

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15 7. On October 22, 2021, Facebook submitted its initial statement. Facebook argues, among
16 other things, that (1) Facebook produced all documents ordered by Judge Corley; and (2) the five
17 categories of ADI-related documents Plaintiffs request go beyond the scope of Judge Corley's order.
18 See Facebook's Supplemental Submission Re: ADI.

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20 8. On November 4, 2021, Plaintiffs submitted their response. Plaintiffs argue, among other
21 things that (1) Facebook should produce additional reports regarding the six exemplar apps because
22 additional reports were identified in Facebook's privilege logs; and (2) Facebook failed to show how
23 the five categories of ADI-related documents Plaintiffs request are not "consistent with the guidance
24 offered by" Judge Corley's order. See Plaintiffs' Response Re: ADI.

1 9. On November 4, 2021, Facebook submitted its response. Facebook argues, among other
2 things that (1) Facebook's production pursuant to Judge Corley's order is complete; (2) Plaintiffs'
3 requests for all reports and memoranda for all apps or developers investigated in phases two or three
4 of the ADI and beyond the scope of Judge Corley's order; and (3) there is no basis for Plaintiffs to
5 request ADI related communications because Judge Corley previously reviewed these
6 communications *in camera* and did not order the production of such communications. See
7 Facebook's Response Re: ADI.
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9 10. A hearing was held on December 4, 2021, regarding the parties' submissions and
10 other information related to the ADI issues.

11 11. On December 8, 2021, Special Master Garrie issued an Order Regarding the
12 Production of ADI Documents.

13 12. On December 15, 2021, Facebook submitted a Motion for Reconsideration of
14 Special Master's Order Regarding the Production of ADI Documents.

15 13. On December 22, 2021, Special Master Garrie issued an Amended Order
16 Regarding the Production of ADI Documents which required Facebook to provide to Special Master
17 Garrie for *in camera* review, all ADI related communications pertaining to the six exemplar
18 applications.
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20 14. Facebook subsequently provided to Special Master Garrie over 6,000 documents
21 comprising the ADI related communications pertaining to the six exemplar applications.

22 15. On January 10, 2022, Special Master Garrie issued a Supplemental Order
23 Regarding the Production of ADI Documents.

24 16. On January 20, 2022, Facebook submitted a Motion for Reconsideration of
25 Supplemental Order Regarding the Production of ADI Documents.
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FINDINGS

17. Special Master Garrie finds that, pursuant to Judge Corley’s Order Granting Motion to Compel ADI Materials, documents prepared in connection with the ADI are not protected from discovery as attorney work product because the documents served a business purpose separate from litigation. See Order Granting Motion to Compel ADI Materials, at 5 (“In light of Facebook’s own statements, the Court finds that Facebook would have conducted the ADI in substantially the same form even in the absence of potential litigation; that is, that Facebook did not initiate the ADI because of the prospect of litigation. See *Phoenix Techs. Ltd. v. VMware, Inc.*, 195 F. Supp. 3d 1096, 1105 (N.D. Cal. 2016) (holding that dual purpose documents were not protected work product because they served a business purpose independent of litigation).”)

18. Accordingly, all ADI related documents, including communications where attorneys were listed as copied (i.e. cc’d) are discoverable except for ADI related documents created for the primary purpose of obtaining legal advice from attorneys. See *United States v. Chevron Texaco Corp.*, 241 F. Supp. 2d 1065, 1076 (N.D. Cal. 2002) (“The mere fact that outside counsel was copied with the email will not shield communications not made for the purpose of securing legal advice.”).

19. After reviewing a substantial portion of the 6,000+ documents pertaining to the six exemplar apps that Facebook provided, Special Master Garrie finds that a substantial number of the documents are relevant to the case and not protected by privilege. See e.g. FB-ADI-INCAMERA-0000000098.msg; FB-ADI-INCAMERA-0000000005.msg; FB-ADI-INCAMERA-0000000084.msg; FB-ADI-INCAMERA-00000000854.pptx; FB-ADI-INCAMERA-00000000262.pdf; FB-ADI-INCAMERA-00000000126.xlsx.¹

¹ These files are referenced by the file names provided in Facebook’s submission of the 6,000+ communications and related documents pertaining to the six exemplar apps.

ORDER

20. Facebook is to produce all documents relating to the ADI from all custodians that the parties have identified and collected, subject to the following conditions:

a. Facebook does not need to produce, review, or log for privilege any emails in which Facebook or Gibson Dunn attorneys are listed in the FROM fields of the email header.

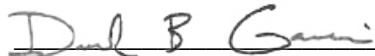
b. Facebook does not need to produce, review, or log for privilege any emails in which Facebook and Gibson Dunn attorneys are the exclusive individuals listed in the TO fields of the email header.

c. Facebook is to review all others emails in which Gibson Dunn or Facebook attorneys are listed in the CC or BCC fields of the email header, produce such emails that relate to the ADI, and log such emails for which Facebook asserts privilege pursuant to the Privilege Protocol.

21. Any subsequent motions regarding the production of ADI related documents are to be brought before Judge Corley.

IT IS SO ORDERED.

January 31, 2022


Daniel Garrie
Discovery Special Master